



## **Case Summary**

Appellant-Defendant Roberto Castillo (“Castillo”) challenges the forty-year sentence imposed upon him following his plea of guilty to Child Molesting, as a Class A felony.<sup>1</sup> We affirm.

## **Issue**

Castillo presents a single issue for review: whether the trial court abused its sentencing discretion in the finding and weighing of aggravating circumstances.

## **Facts and Procedural History**

On April 19, 2004, the State charged Castillo with Rape,<sup>2</sup> Criminal Confinement,<sup>3</sup> Criminal Deviate Conduct,<sup>4</sup> and Child Molestation. The State also alleged that Castillo is a habitual offender.<sup>5</sup> Castillo’s jury trial commenced on June 5, 2006. After the victim’s testimony, Castillo pled guilty to one count of Child Molestation. The State moved to dismiss the remaining charges and the habitual offender allegation.

On July 7, 2006, the trial court sentenced Castillo to forty years imprisonment. On March 29, 2007, the trial court granted Castillo leave to file a belated notice of appeal. Castillo now appeals his forty-year sentence.

## **Discussion and Decision**

At the time of Castillo’s offense, Indiana Code Section 35-50-2-4 provided in relevant part: “A person who commits a Class A felony shall be imprisoned for a fixed term of thirty

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<sup>1</sup> Ind. Code § 35-42-4-3.

<sup>2</sup> Ind. Code § 35-42-4-1.

<sup>3</sup> Ind. Code § 35-42-3-3.

<sup>4</sup> Ind. Code § 35-42-4-2.

(30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances.”

In sentencing Castillo to a term of ten years more than the presumptive sentence, the trial court found the following aggravators: Castillo had a criminal history including two felony convictions and eight misdemeanor convictions, he had violated the terms of his probation in the past, he had failed to appear in court as ordered, he was unsatisfactorily discharged from a Community Oriented Work Program, he was an illegal alien who returned to the United States despite prior deportation, he had accumulated a large child support arrearage, and he used force in the commission of the crime. The trial court found Castillo’s guilty plea to be mitigating, but not deserving of substantial mitigating weight, because the victim was not spared having to testify at trial.

In general, sentencing determinations are within the trial court’s discretion. Cotto v. State, 829 N.E.2d 520, 523 (Ind. 2005). Castillo argues that the sentencing court abused its discretion by according significant weight to his criminal history and by finding as aggravators his status as an illegal alien and the use of force in the commission of the crime.

The significance of a criminal history varies based on the gravity, nature and number of prior offenses as well as their proximity and similarity to the instant offense. Duncan v. State, 857 N.E.2d 955, 959 (Ind. 2006). Castillo had a significant criminal history, spanning several years, which included two felonies and eight misdemeanors. His two prior battery convictions, like the present offense, were offenses against a person. He had failed to benefit from prior rehabilitative efforts, as he violated the terms of his probation and was

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<sup>5</sup> Ind. Code § 35-50-2-8.

unsuccessfully discharged from a community corrections program. Castillo had been deported for illegal conduct, but returned to the United States without legal authorization to do so. The trial court did not abuse its discretion in finding Castillo's criminal history to have sentencing significance.

Castillo concedes that his reentry after prior deportation is a valid aggravator but alleges, "the court's blanket finding that illegal alien status alone amounts to an aggravator is error." Appellant's Brief at 5. Castillo does not develop a corresponding argument to support his contention. Nevertheless, Castillo is in this country in violation of our immigration law, and this Court has previously determined that a defendant's illegal alien status is an aggravating circumstance that a trial court may properly consider. See Alexander v. State, 837 N.E.2d 552, 556 (Ind. Ct. App. 2005), disapproved of on other grounds, Ryle v. State, 842 N.E.2d 320, 323 n.5 (Ind. 2005), cert. denied, 127 S. Ct. 90 (2006).

Finally, Castillo challenges the aggravator of use of force. At the guilty plea hearing, Castillo stated only that he "caused C.M. to submit to sexual intercourse." (Tr. 14.) Castillo now argues that this admission is not equivalent to an admission that he used force. However, according to the presentence investigation report, the thirteen-year-old victim stated that Castillo was armed with a butcher knife when he came out of a bedroom closet, grabbed her, pushed her onto a bed, and engaged in sexual intercourse with her. Castillo specifically advised the trial court that there were no factual errors in the presentence report,

which included the victim's version of the events.<sup>6</sup> The trial court did not err in finding that Castillo used force to accomplish the crime of child molestation.

Castillo has failed to establish an abuse of discretion in the trial court's finding and weighing of aggravating circumstances. His forty-year sentence is affirmed.

Affirmed.

BAKER, C.J., and VAIDIK, J., concur.

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<sup>6</sup> A mere failure to object to the accuracy of a presentence report does not constitute an admission, because the defendant's Fifth Amendment right against self-incrimination is implicated. See Ryle, 842 N.E.2d at 323 n.5.